IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 2678 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-
and
Hon'ble MR.JUSTICE H.K.RATHOD sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
No

2. To be referred to the Reporter or not? Yes :

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No :

5. Whether it is to be circulated to the Civil Judge? No :

VIKAS MAJDOOR KAMDAR SAHKARI MANDLI LTD.
Versus
FOOD CORPORATION OF INDIA 3RD SPECIAL LAND ACQUISITION

Appearance:
MR BP TANNA for MR KG SUKHWANI for Petitioner
MR PC KAVINA for M/S THAKKAR ASSOC. for Respondent No. 1
DS AFF.NOT FILED (N) for Respondent No. 2, 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA
and
MR.JUSTICE H.K.RATHOD

Date of decision: 07/08/2000

C.A.V. JUDGEMENT

(Per D.C.Srivastava, J.)

1. This is plaintiff's First Appeal against the Judgment and Decree dated 26.2.1999 passed by Shri Rajesh H. Shukla, City Civil Judge, Court No.4, Ahmedabad, dismissing the Suit of the plaintiff - appellant.

2. The plaintiff appellant herein filed a Suit for permanent injunction, mandatory injunction, and for recovery of Rs.68,07,113.20 ps. with interest at the rate of 18 % from the due date till its realisation on the following allegations :

The plaintiff is a registered co-operative society dealing in business of stevedoring clearance handling and transport work, operating mainly at Kandla Port for loading and unloading. The plaintiff was appointed as a contractor for stevedoring, clearance, handling and transportation at Kandla Port by the defendant through telegram dated 29.7.1994. The appointment was in persuance of tender submitted by the plaintiff in response to public advertisement in the news paper made on behalf of the defendant. The defendant No.1 is the Food Corporation of India (for short "F.C.I.") and the defendants No.2 & 3 are respectively Joint Manager and Zonal Manager of the F.C.I. Under the terms and conditions of the tender notice the plaintiff was required to give daily out put and to handle 750 MT. per day as per charter Party contract and for such handling the rate fixed was Rs.108/- per MT. There were other conditions in the contract that the plaintiff was required to transport, handled cargo, to the godown of the F.C.I. which is situated within a distance of 10 to 15 k.mtrs. from Kandla Port. For transportation, the charges were fixed at Rs.15/- per tonne. By letters dated 30.9.1994 and 14.10.1994 the F.C.I. directed the plaintiff to handle more cargo than was prescribed under the conditions of tender. This request was made by the defendant No.1 in view of threat given by Kandla Port Trust that in case the F.C.I. will not give more out-put at the concerned Port, the Port will stop giving priority of berthing of vessels which were engaged by the F.C.I. In view of these letters the plaintiff started handling more cargo between 1200 to 1300 MT. per day as against contracted rate of 750 MT. per day. For handling more cargo the plaintiff had to incur more expenses on various counts, namely, it had to pay enhanced wages to the

workers as a Gang of port and for transporting the extra cargo unloaded more vehicles were needed for transporting the handled cargo to the godown of the F.C.I. The plaintiff had also to bear more expenses of freight, on demurrage because of handling of more than charter party contract rate. In addition to this the plaintifrf had to incur additional expenses like giving more wages to casual labourers, watchmen, sweepers, etc. Consequently to meet these extra expenses the plaintiff by letter dated 25.10.1994 and Fax Message dated 28.10.1994 demanded more rate for handling extra cargo per day. The F.C.I. neither gave any reply to the above letter and Fax message nor asked the plaintiff to stop handling of extra cargo. The plaintiff had cleared four vessels for the F.C.I. at the rate of 1200 to Rs.1300 MT per day under good faith that the dispute regarding increased rate for handling extra cargo will be settled by the F.C.I. Again letter was sent to the General Manager of the F.C.I. requesting for enhancement of rates for clearance of additional cargo. The plaintiff reliably learnt that the Assistant Manager (Docks) had recommended to the Joint Manager (PO) the plaintiff's case and justifying the plaintiff's claim for enhanced rate. Still no action was taken by the F.C.I. to pay the plaintiff at the enhanced rate. On the other hand the plaintiff was telephonically threatened that if Kandla Port Trust will pull out the vessels of the F.C.I. then the consequential loss will be deducted from the payment which is to be made to the plaintiff. The plaintiff claimed enhanced rate for unloading at the rate of Rs.215/- per MT. and the total amount for this work comes to Rs.1,14,98,006.50 ps. The plaintiff received payment at the rate of Rs.108/- per MT. which comes to Rs.57,75,742.80 ps. The difference which is payable by the defendant to the plaintiff thus comes to Rs.57,20,263.70 ps. For transportation of Sugar bags the plaintiff shifted 36161.65 MT. sugar to F.S.D. Gandhindham. Accordingly the plaintiff claimed enhanced transportation charges at the rate of Rs.45/- per MT. which comes to Rs.16,27,274.25 ps. As against this the defendant had paid at the rate of Rs.15/- per MT. to the tune of Rs.5,42,424/hence a further sum of Rs.12,84,849.50 ps. is required to be paid for transportation charges. On the above allegations the Suit was filed claiming the above reliefs.

3. The Suit was resisted by the defendants through Joint written statement taking composite defence in reply to the plaint as well as in reply to the injunction application. It was pleaded that the Suit as well as injunction application is barred by Specific Relief Act

inasmuch as alternative efficacious remedy is available and no suit for injunction can be maintained. The plea of estoppel, misjoinder and non-joinder of parties was also raised. It was alleged that the plaintiff failed to shift the discharged cargo from the vessels to the defendant's godown as per terms and conditions of the contract, still it wanted enhanced rate which is not permissible. It was alleged that the plaintiffs are obliged by the contractual provisions to give acellerated rate of discharge of cargo at their own interest, else they have to incur loss of dispatch money to the defendant. It was also pleaded that the plaintiff can claim payment from the defendant only for the service which it was asked to perform as per the provisions of the contract and for services rendered at their own interest and not covered by contract the defendant cannot be expected to pay anything to them. It was only to avoid payment of demmurage that the plaintiff undertook extra unloading hence the defendants are not obliged to pay any extra amount other than the rate mentioned in the contract. It is also pleaded that according to clause 41 of the contract the plaintiff is bound to abide by all the rules and regulations of inter-alia the Port Authorities, Railways, Police, etc. and since direction was given to the plaintiff keeping in view the threat given by Kandla Port Trust for extra handling of cargo the plaintiff is bound by those directions and no extra payment is to be made. It was denied that the plaintiff was not given full payment for the work done. Concluding averment in the written statement is that the plaintiff's claim for payment towards extra expenses for services not covered by the contract is untenable. It was also pleaded that the Court below had no jurisdiction to entertain the Suit. On these averments it was pleaded that the suit is liable to be dismissed.

4. The trial Court framed seven issues arising out of the pleadings of the parties. It was held by the trial Court that it had jurisdiction to entertain the Suit and decide the same. It was further held that the plaintiff was appointed as contractor for stevedoring, clearance and for transportation at Kandla Port persuant to the tender. It was further held that the plaintiff was carrying out the work of transport and handling the cargo as per terms and conditions of the tender. It was, however, found by the trial Court that the plaintiff is not entitled to enhancement of charges, for handling the cargo, raised from Rs.108/- per MT. to Rs.215/- per MT. It, however, found that the plaintiff was unloading the quantity of goods more than that stipulated in the tender. On the basis of the finding that the plaintiff

is not entitled to enhancement of rate of handling the cargo from Rs.108/- per MT. to Rs.215/- per MT. it was held that the plaintiff is not entitled to recover the amount claimed in the Suit.

5. No issue was framed by the trial Court whether the plaintiff is entitled to enhanced transportation charges at the rate of Rs.45/- per MT. as against the contracted rate of Rs.15/- per MT. Likewise there is no issue or finding that the plaintiff is entitled to declaration, injunction, mandatory as well as prohibitory as claimed in the plaint.

6. On the above findings the Suit of the plaintiff was dismissed by the trial Court with no order as to costs, hence this Appeal by the plaintiff.

7. We have heard Shri B.P.Tanna, Senior Advocate on behalf of the Appellant and Shri P.C.Kavina representing M/s. Thakkar Associates, on behalf of the respondent. We have examined the voluminous record of the case.

8. On 26.4.2000 this Court (Coram : H.R.Shelat & H.H.Mehta, JJ.) ordered that the notice be issued making it clear that the Court may hear the Appeal finally on 14.6.2000. Accordingly the Appeal was heard finally at the admission stage. The record from the lower Court was summoned. In these circumstances in view of the order of the earlier Bench priority has been given for final hearing of this Appeal of 1999.

9. After examining the Judgment under Appeal it is found that the trial Court has not properly applied its mind to the real controversy between the parties. Proper issues were not framed. No issue was framed regarding claim of the plaintiff for enhanced transportation charges and no finding has been given in the Judgment any where whether the plaintiff is entitled to enhanced transportation charges or not. Likewise no finding has been given by the trial Court on the relief of declaration, injunction, permanent and mandatory, nor any issue has been framed on these pleas. However, we do not find it expedient to remand the case for framing proper issues in the case and for de-novo trial because that would simply delay the disposal of the Suit. Since the evidence is already on record and parties adduced evidence fully knowing well their respective cases the matter can be decided finally by the Appellate Court.

10. We further find that in the Judgment except repetition for 5-6 times on the same point, may be in the

nature of pleading or arguments or findings, there is no definite conclusion and clear expression of the mind of the trial Court. In these circumstances, being conscious of the fact that the Judgment of the trial Court is a sacred document no unnecessary stricture should be passed, hence we proceed to undertake the exercise of deciding the whole matter effectively and conclusively.

11. So far as the first relief in the plaint is concerned the plaintiff has prayed that the defendant be restrained from recovering and/or withholding any amount from the bills of the plaintiff towards any alleged liability. The stand of the defendants in the written statement was that since the final bill was not submitted by the plaintiff there arose no occasion for withholding any amount from the bill of the plaintiff. However, in the course of argument Shri P.C.Kavina informed that payment for the extra work has already been made to the plaintiff at the contracted rate of Rs.108/- per MT. for clearance of cargo and at the rate of Rs.15/- per MT. for transportation and that the security money of the contractor - plaintiff has also been refunded and no deduction has been made on any count whatsoever. This statement of Shri P.C.Kavina was not controverted in the course of argument by Shri B.P.Tanna, learned Counsel for the plaintiff - appellant. Consequently the first relief cannot be granted now in this Appeal. The plaintiff is, therefore, not entitled to permanent injunction against the defendant as claimed in Para : 14(a) of the plaint. As a consequence of the above finding the relief of declaration sought for by the plaintiff also cannot be granted.

12. The second relief is for a declaration that the action of the defendant in recovering various amounts and not deciding the rates for the extra work is not tenable at law. No recovery is contemplated by the defendants against the plaintiff. Of course the decision regarding rates for extra work is yet to be taken. Shri P.C.Kavina has, however, contended that it will be implied rejection of the representation of the plaintiff wherein extra rate was claimed by the plaintiff. However, there is nothing like implied rejection and we will discuss this matter while dealing with Relief (e). It is, therefore, held that the plaintiff is not entitled to declaration sought for in Para : 14(b) of the plaint.

13. So far as relief in Para : 14(C) of the plaint is concerned it is in the nature of mandatory relief which cannot be granted straightaway. It will be discussed while considering relief 14(e) whether the plaintiff is entitled to extra amount claimed in the

plaint. Consequently no mandatory relief claimed in this para can be granted.

14. We are then left with consideration of relief contained in Para : 14(e) wherein the plaintiff has claimed decree for Rs.68,07,113.20 ps. together with interest at the rate of 18 % p.a.

15. Shri B.P.Tanna, has rightly contended that the trial court has not given any clear finding and has made vague and casual reference of clauses 34, 35 and 41 of the Agreement to dislodge the claim of the plaintiffs. We have examined clauses 34 and 35 of the Agreement and we are in agreement with the contention of Shri Tanna that these two clauses could not be pressed in service for dislodging the claim of the plaintiff. We have already mentioned above that the Judgment of the Court below is specimen of repetition and no clear finding with cogent reason has been recorded. In the Judgment in Para : 15 it is mentioned that it was argued on behalf of the F.C.I. that under clauses 34, 35 and 41 of the Agreement the plaintiff contractor agreed to abide by the rules and regulations of other authorities. We have not been able to find clear answer to this argument incorporated in the Judgment of the trial Court. However, after examining clauses 34 & 35 of the Agreement we find that these two clauses are not relevant nor on the basis of these clauses the plaintiff could be non-suited.

16. So far as clause 41 is concerned it reads as under :

"The contractor shall strictly abide by all rules and regulations of the port authorities, Railways, police, Municipal authorities, etc.

The trial Court found that this clause applies with full force inasmuch as the F.C.I. was directed by Kandla Port Trust to undertake speedy unloading of the vessels failing which priority of berthing to the vessels will not be granted and the possibility of pulling out the vessels could not be ruled out. The question is whether such direction by the Kandla Port Authority to the F.C.I. could be binding upon the plaintiff contractor. Our answer to this is in negative. What is meant by clause (41) is that the contractor shall strictly abide by all rules and regulations of the Port Authorities. The contractor was bound, to observe rules and regulation of the Port Authorities and any oral direction not emerging from the rules and regulation of the Port Authorities given to the F.C.I. was hardly binding on the contractor. Consequently in our view the

Court below was not justified in dislodging the claim of the plaintiff on the ground that under clause (41) of the Agreement the plaintiff contractor was bound to do extra work.

17. In the instant case the main dispute is regarding extra remuneration claimed by the plaintiff. The trial Court has observed that under the Agreement the plaintiff was bound to undertake extra clearance also and that the plaintiff could not claim extra remuneration. The trial Court has relied upon in its judgment clause XX, Part-I(i) for stevedoring in the Agreement which provides for stevedoring Clause (1)(i). It which reads as under :

> "The contractor shall ensure the discharge of cargo in a vessel handled by him at the rate not less than what is provided for in the Charter Party of the concerned vessel and ultimately if there has been any short fall in the discharge of the vessel at the stipulated rate and consequential demmurrage charges, the contractor will be responsible for the same and will make good whatever losses and expenses incurred by the Corporation, the Corporation shall have the right to deduct those losses from the admitted bills of the contractor."

This clause in the Agreement was interpreted by the trial Court in the sense that under the Agreement minimum clearance expected from the contractor was 750 MT. per day. However, this clause in the Agreement has to be read along with Charter Party Agreement. In Charter Party Agreement the plaintiff contractor was not a party. However, in view of the Agreement referred to above reference to charter party has to be made and it cannot be said that the words "not less than" what is provided in the charter party in the main agreement mean that minimum expected from the plaintiff was to clear 750 MT. per day and there was no limit for maximum clearance. If this Agreement is read along with charter party agreement, Ex.91, it can be said that there is clear provision in clause (19) of the Charter Party Agreement that the emphasis is on average rate of 750 MT. per day clearance and not the minimum clearance of 750 MT. per day. There is distinction between the minimum rate of clearance and average rate of clearance. Minimum rate of clearance means that the contractor was to undertake minimum clearance at the rate of 750 MT. per day, but there was no outer limit and if some excess work is done nothing has to be paid to the contractor, whereas average rate means if on some day less clearance is done

and on the other day more clearance is done then the average of these two days will be worked out and this average should not be less than 750 MT. per day. We are unable to agree with the contention of Shri P.C.Kavina that minimum of 750 MT. per day clearance was provided in the Agreement read with charter party agreement and there was no limit for excess clearance. It is a matter of common sense that the contractor could have agreed to submit the tender only at the rate contracted for and not beyond that. In Para : 22 of the charter party Agreement, Ex.91 it is further mentioned that ship to discharge at the average rate of 750 MT. Thus, from clauses 19 and 22 of the Charter Party Agreement it is clear that average rate of clearance at the rate of 750 MT. per day was expected. Since in the main Agreement it is mentioned that the contractor shall ensure the discharge of cargo in a vessel handled by him at the rate not less than what is provided in the charter party Agreement of the concerned vessel it means not less than the average of 750 MT. per day. Thus, it is the average of 750 MT. per day clearance which was expected from the contractor and not that it was minimum 750 mt. per day clearance as urged by Shri P.C.Kavina.

18. Shri P.C.Kavina further contended that the extra clearance was done gratituously by the contractor. We are again unable to agree with this contention. There is no reason to accept this plea that the contracotr could have undertaken extra clearance gratituously without being remunerated for extra expenses. After all it was a temporary contract for one year and not a permanent contract. There is no mention that any assurance was given to the plaintiff that in case extra clearance is undertaken fresh contract for the next year will be given to the plaintiff. We are therefore unable to accept the contention that the extra clearance or extra transportation was done by the plaintiff gratituously.

19. The trial Court has not taken into consideration clause (xvi) of the Agreement which provides for remuneration. The trial Court, therefore, did not consider a material clause in the Agreement hence the finding to the contrary recorded at by the trial Court has to be set aside. The finding which is given casually without reference to the record on the Agreement between the parties is no finding in the eyes of law hence it cannot be sustained.

20. Clause (xvi)(a) provides that the contractor shall be paid remuneration in respect of services prescribed in Para XX and performed by them at the

contracted rates. Clause (xx) of the Agreement provides for services to be performed by the contractor. We have already quoted relevant portion of Part : I of this para earlier in our Judgment. Shri B.P.Tanna did not place reliance upon clause (xvi)(a) for the obvious reason that it is a general provision. He has, however, placed reliance upon clause (xvi)(b) of the Agreement which provides as under :

> If the contractors are required to perform any services in addition to those specifically provided for in the contract and the annexed schedule, the contractors remuneration for the same will be paid at the rate as negotiated and fixed by mutual agreement."

21. Placing reliance upon this clause, Shri Tanna contended that the contractor's remuneration for additional work other than specifically mentioned in the contract shall be paid at the rate as negotiated and fixed by mutual agreement. He further contended that the letters and Fax message were given by the plaintiff claiming enhanced rate for clearance as well as for transportation, but no action has been taken by the F.C.I. No negotiation took place nor any meeting was called between the officers of the F.C.I. and the plaintfif for ariving at mutual agreement and settlement for extra remuneration. It is because of this inaction of the F.C.I. that the plaintiff has filed the above mentioned Suit in the Court below. Mr.P.C.Kavina contended that if no action was taken by the F.C.I. or its officers it will be deemed that the request of the plaintiff was impliedly rejected. There is nothing like implied rejection of representation made by the plaintiff. If written representation was made by the plaintiff without loss of time claiming extra charges the same should have been considered and reply in writing should have been given to the plaintiff whether the extra claim was accepted or rejected. If no such written reply was given it will be deemed that no action was taken by the officers of the F.C.I. and not that the representations of the plaintiff have been impliedly rejected. There is no principle of law, general or administrative, that a representation which is not replied will be deemed to have been rejected.

22. Clause : XVI (c) of the Agreement further provides that the question whether a particular service is or is not covered by any of the services specifically described and provided for in the contract, or is not auxiliary or incidental to any of such services, shall be decided by the Sr. Regional Manager whose decision shall

be final and binding on the Contractor. The words "decision of the Senior Regional Manager of the F.C.I." mean that there should have been written decision which should be communicated to the contractor. Unless written decision is taken and communicated to the contractor it cannot be said that any such decision will be binding on the contractor under clause XVI(c) of the Agreement. Even oral rejection was not communicated to the plaintiff.

Clause : XVI (d) provides that the contractors will have the right to represent in writing to the Sr. Regional Manager that a particular service which he is being called upon to perform is not covered by any of the services specifically provided for in the contract, or as the case may be, is not auxiliary or incidental to such services, provided that such representation in writing must be made within 15 days of the commencement of actual performance of such services. If no such representation in writing is received within the said time, the contractor's right in this regard will be deemed to have been waived.

23. It cannot be said that the contractors' right to claim extra remuneration stood waived under clause XVI(d) of the Agreement. Letter dated 14.10.1994 of the FCI written to the plaintiff desired the plaintiff to rise to the occasion and achieve target of discharge of 2000 MT. every day. It was also informed that the FCI had sufficient space available in FSD and sufficient DIS for out station despatches. Therefore it is for the plaintiff to arrange for sufficient gangs/trucks for shifting to FSD for internal shifting/wagon loading. Ex.65 is a letter dated 25.10.1994 written by the plaintiff to the defendant demanding extra expenditure to be incurred by the plaintiff for maintaining more than charter party rate and loss suffered to the plaintiff by way of payment of shed demmurrage and wagon demmurrage. On 28.10.1994 Fax Message (Exh.66) was sent to the defendant claiming extra expenditure. Ex.68 is another letter dated 9.11.1994 written by the plaintiff to the defendant claiming extra charges. Consequently these representations should have been decided by the defendant. Ex.68 is another letter dated 10.11.1994 claiming extra transportation charges. Thus, in view of the provisions in clause XVI of the Agreement it cannot be said that the Suit is not maintainable.

24. The question for consideration now is whether the

plaintiff has unloaded and transported extra quantity of goods than that stipulated in the contract and if so whether the plaintiff is entitled to extra remuneration and if so, at what rate ?

25. It is not in dispute now that the plaintiff has unloaded extra quantity of goods and also transported extra quantity of goods. Under Issue No.5 the trial Court has itself held that the quantity of goods unloaded is more than that stipulated in the tender. No cross objection has been filed against this finding of the trial Court nor any cross appeal has been filed challenging the finding on Issue No.5 recorded by the trial Court. More over it is further clear from the record that the contractor plaintiff submitted bill claiming extra remuneration for extra work, and for extra work remuneration was paid at the contracted rate, namely, at the rate of Rs.108/- per MT. for unloading and Rs.15/- per MT. for transportation to F.C.I. Godown Gandhidham. Consequently it is held that the plaintiff unloaded and transported the goods more than that stipulated in the contract. We have already mentioned earlier in this judgment that the plaintiff was required to unload 750 MT. goods on average per day and that this was minimum average requirement expected from the plaintiff. We do not agree with the contention of Shri P.C.Kavina that there was no outer limit and if the plaintiff unloaded extra goods no extra remuneration is to be paid. We also do not agree with the contention of Shri Kavina that other charter party Agreement has not been filed by the plaintiff hence it cannot be said that average unloading in other charter party Agreement was 750 MT. per day. However, the Charter party Agreements are not in possession of the plaintiff. One charter party Agreement was summoned by the plaintiff from the defendant which was filed. If there was some contrary stipulation in other charter party Agreement the defendant F.C.I. could have filed the same to controvert the case set up by the plaintiff. That has not been done. More over if four vessels were to be unloaded by the plaintiff it hardly appeals to reason that there would have been different stipulations in different charter party Agreements so far as average quantity of unloading per day is concerned.

26. If it is established by the plaintiff that extra quantity of goods was unloaded and transported by it, the next question is whether the plaintiff is to be paid extra remuneration for extra work ?

27. The contention of Shri P.C.Kavina on this point

has been that the plaintiff is not entitled to any extra remuneration whereas Shri B.P.Tanna for the Appellant contended that if extra work was done which was in excess of the rate and quantity mentioned in the contract and the Agreement the plaintiff has right to claim extra remuneration. Shri P.C.Kavina in reply to this Argument of Shri Tanna contended that the extra work was done by the plaintiff gratituously. We have already answered in the forgoing portion of this judgment that the extra work could not have been done gratituously. According to Shri Kavina, because the plaintiff in its letter dated 25.10.1994 (Ex.65) gave threat that if extra payment is not made the society will have no alternative but to reduce the discharge rate as per charter party Agreement and since despite this threat the plaintiff went on for extra unloading it will be deemed that the extra work was done gratituously. We are unable to accept this contention nor this can be a ground for holding that the extra work was done by the plaintiff gratituously. In all the letters the plaintiff was requesting to pay extra remuneration for extra unloading and transportation. In the letter Ex.67 extra rate at the rate of Rs.216/- per MT. was demanded by the plaintiff and details of this claim were annexed with this letter. Likewise extra transportation charges at the rate of Rs.45/- per MT. were demanded through letter Ex.68. In this view of the matter, we are unable to accept the contention that extra work was done gratituously.

28. Another contention of Shri P.C.Kavina has been that the work done by the plaintiff was extra contractual hence no payment is to be made. We are again unable to accept this contention. Extra unloading was done at the request of the F.C.I. to undertake more loading per day because of direction of the Kandla Port Trust. This extra unloading arose out of the subsisting contract and not that it was extra contractual work which was done by the plaintiff contractor. We are also unable to accept the contention of Shri Kavina that the claim for extra work amounts to novation of contract. It was not actually novation of contract by the contractor, but the contractor was acting upon the request of the F.C.I. to expedite unloading and undertake unloading as desired by the Kandla Port Trust. We have already held earlier that under the contract read with charter party Agreement the contractor plaintiff was required to unload on an average 750 MT. goods per day, and not that it was minimum which was expected to be unloaded per day by the plaintiff. If this was so then for extra work done by the plaintiff it cannot be said that it was extra contractual work or work out-side the terms of Agreement. The plaintiff is,

therefore, entitled to extra remuneration for extra unloading and also for extra transportation of unloaded goods. Even otherwise the compensation quantum meruit can be awarded to the plaintiff for the work done or the services rendered when price thereof is not fixed by a contract as laid down by the Apex Court in M/s. Alopi Prashad and Sons, v/s. Union of India, reported in AIR 1960 SC 588. This case was cited by Shri P.C.Kavina, who contended that the principle of quantum meruit cannot be applied when the contract provides for consideration payable in that behalf. We are, however, unable to agree with this contention. The Apex Court in this case has laid down that compensation quantum meruit is awarded for work done or services rendered, when the price thereof is not fixed by a contract. For work done or services rendered pursuant to the terms of a contract, compensation quantum meruit cannot be awarded where the contract provides for the consideration payable in that behalf. Quantum meruit is but reasonable compensation awarded on implication of a contract to remunerate, and an express stipulation governing the relations between the parties under a contract, cannot be displaced by assuming that the stipulation is not reasonable. In our view the ratio of the Apex Court in the above case is that where there is no price fixed for the work or extra work done by the plaintiff under the contract or the Agreement then on principles of quantum meruit compensation can be awarded. However, no such compensation, namely, quantum meruit can be awarded where the contract provides for consideration payable in that behalf. In the Agreement in question there is no provision for extra payment or the rate at which extra payment is to be made for extra work done by the contractor. On the other hand for remuneration for extra work there is provision under clause XVI of the Agreement and in view of sub-clause (b) of clause XVI of the Agreement extra payment or extra remuneration can be paid by negotiation and mutual settlement. Since no negotiation took place in this case despite written request of the contractor and no mutual settlement was arrived at despite request of the contractor in various letters referred to above the principle of compensation quantum meruit can be applied in this case.

29. The next question for consideration now is at what rate extra remuneration for unloading and transportation is to be paid by the F.C.I. to the contractor. It is clear from clause XX of the Agreement that in case of short-fall in discharge of the vessel at the stipulated rate, namely, at the average rate of 750 MT. per day the contractor will be responsible for

consequential demmurrage charges, and also to other losses and expenses incurred by the Corporation and the Corporation will have right to deduct these losses from admitted bills of the contractor. If on the one hand the contractor is to be held liable for all consequential losses in case of short fall in discharge of the vessels there is no reason or equity against the contractor that if excess unloading is done the benefit of the same is not to be given to the contractor and he is to be deprived of extra expenses incurred by him in meeting the extra discharge. It has been urged by Shri B.P.Tanna that the demmurrage charges per day on account of short fall in discharge was 4000 US Dollars whereas the dispatch money which the F.C.I. has earned is 2000 US Doller per day because of extra discharge done by the plaintiff. He, therefore, argued that if the F.C.I. has earned dispatch money at the rate of 2000 US Dollar per day and the work of the contractor was appreciated by the F.C.I. in increasing the discharge vide letter dated 30.9.1994 there is no reason why extra payment should not be made. Extra payment has been claimed at the rate of Rs.215/- per MT. for unloading vessels. The Court below has rejected this claim on the ground that nothing in support of this extra claim has come in evidence from the side of the plaintiff. Shri P.C.Kavina also vehementally urged that there is no evidence to show what extra unloading was done each day by the plaintiff and how much extra quantity was transported to F.C.I. godown, Gandhidham. He further contended that there is no material on reocrd as to what should be enhanced rate and there is no solid material to show what extra work was actually done by the plaintiff and what extra expenses were incurred by the plaintiff. According to Shri P.C.Kavina unless each and every expense was proved by the plaintiff the Suit was rightly dismissed by the trial Court. In our opinion, this contention has little force. It was not a contract for recovery of money on the basis of actual expenditure. On the other hand there was contract of average discharge at the rate of 750 MT. per day. There was no provision in the contract as to at what rate extra work is to be remunerated. For this, correspondence was made by the plaintiff and the details of extra unloading charges were annexed with the letter Ex.67 dated 9.11.1994. This letter was not replied by the F.C.I. controverting that the claim is excessive or exorbitant. The silense of the F.C.I. will therefore mean that whatever was mentioned in this letter was accepted as correct by the F.C.I. The court below was therefore not justified in observing that the plaintiff has not proved by any evidence as to how it was entitled to claim extra unloading charges at the rate of Rs.215/-

per MT.

30. For additional transportation charges the plaintiff claimed through letter dated 10.11.1994 Ex.68 at the rate of Rs.45/- per tonne. This letter was also not replied by the F.C.I. Every details have been given in this letter, how extra transportation charges were claimed. It has been mentioned in this letter that for various reasons extra transportation charges were claimed. One of the reasons was that due to shifting of material more than charter party the plaintiff had to engage more trucks from the market and heavy shifting stocks created shortage of trucks in the market and the plaintiff paid more than four times rates to the trucks as provided in the schedule of rates. Another ground in support of extra transportation charges was that the trucks at F.S.D. godown were detained considerably for which the contractor paid extra charges for detention of trucks per trip for transportation. Consequently Rs.45/- per tonne were claimed as transportation charges as against agreed charges for transportation at the rate of Rs.15/- per tonne.

31. Likewise to substantiate extra charges for unloading vessels the details were given in the letter dated 9.11.1994, Ex.67. In addition to the annexure giving details justifying the claim of Rs.216/- per mt. it is mentioned in the body of letter that for increasing discharge rate four times the plaintiff incurred additional expenditure on D.L.B. Gangs, Shore Crains, Short labours, trucks, unloading gangs and extra payment of sundry. It was not sheer imagination of the plaintiff to raise such claim. It is significant to mention that in letter dated 30.9.1994 the F.C.I. has requested the plaintiff to rise to the occasion and comeforward for discharge rate of minimum 2000 MT. per day with all machinery of the plaintiff geared up to ensure maintaining four gangs/crain in each shift so as to achieve the target of not less than 2000 MT. per day wihout fail. Thus, it was well in the contemplation of the F.C.I. that four gangs and crane, etc. in each ship were to be arranged by the contractor besides other machinery and man power to run and manage the machinery.

32. The question now is whether the extra claim of remuneration for unloading at the rate of Rs.216/- per MT. is reasonable so also the claim of Rs.45/- per tonne for transportation charges.

33. Shri P.C.Kavina has argued that on this point there is no evidence from the side of the plaintiff to

justify this claim and that he also urged that the defendant's witness has not supported the plaintiff's claim as argued by Shri B.P.Tanna for the appellant. He further contended that the plaintiff can succeed on the strength of its own case and evidence and cannot succeed on the weakness in defence. He also pointed out that solitary witness examined by the defendant never supported the plaintiff, rather he has demolished the case of the plaintiff and stated that the plaintiff did not do the minimum work as provided under the contract on various dates. However, in our opinion admission of a party is the best evidence against it unless it is explained to be erroneous or to have been made under some confusion or mistake. Ex.90 is the letter to the Joint Manager (PO), F.C.I. Gandhidham, written by Assistant Manager (KS) of the F.C.I. Shri P.C.Kavina argued that this is internal correspondence which cannot be read as admission nor it can be read as clinching and conclusive evidence. We are again unable to agree with the contention of Shri P.C.Kavina. It was not a casual internal correspondence between the Assistant Manager (KS) of F.C.I. written to Joint Manager (PO), F.C.I. Gandhidham. On the other hand this was letter in response to the letter dated 28.10.1994 written by the plaintiff as well as letter dated 9.11.1994 written by the plaintiff claiming extra charges for transportation and unloading. The matter was examined and this letter clearly indicates that the claim of the plaintiff was fully supported. It is mentioned in Para : 2 of this letter that the extra expenditure of Rs.215/- per MT. claimed by the contractor itemwise was checked at the prevailing rate for various items of operation with reference to DLB rates and locally and are found more or less justified. DLB rates latest were enclosed. However, DLB rates enclosed were not filed by the defendant along with this letter. Even if no adverse inference can be drawn against the defendant for not filing DLB rates, it can be said that this letter itself was based on the DLB rates and it justified more or less claim of the plaintiff for extra expenditure at the rate of Rs.215/- per MT. It is further mentioned in this letter that in case discharge rate is required to be increased expenditure on hooks and related item of works, namely, increase in number of casual labour on hatches and wharf, tally clearks/cranes, gear, foreman, etc. are also equally increased proportionately. It was further mentioned that speed money to each and every DLB gang members, crane drivers, shore labourers and other organisation are also added heavily on costing. The practice of speed money is in vogue in all major/minor ports of India. The ultimate recommendation was that

therefore proportionate increase in the expenditure in eventof more discharge cannot be just ignored. It was also mentioned in this letter that if more discharge is required to be maintained more cargo is required to be shifted to Transit shed due to unworkman like performance by FCI H & T Contractor in FSD, many times loaded truck were detained in FSD which adversely affected the discharge. In such case the Cargo is required to be moved to transit shed. In such event also the contractor is required to afford double handling of one unloading and extra loading and transportation to transit shed besides extra expenditure on talley clerks, casual labourers and security staff.

34. Regarding transportation charges it is mentioned in this letter that transportation on the vital operation has direct link with the rate of discharge. If more cargo is required to be shifted, more trucks are required to be acquired to ensure matching clearance to avoid dumping on wharf which will have adverse effect on discharge. If more trucks are acquisitioned the demand in local market increases. Gandhidham being small place, limited sources only exist to acquire trucks. Because fluctuation in market due to demand by other private parties to clear cargo like plastic granules, MOP, sulphur, private sugar, soya, scrap etc. The rate fluctuates and the burden of extra payment always found having effect on the costing. Moreover due to 100 % checking of sugar by custom of wharf, each and every chits are endorsed by customs, KPT security, FCI etc. there is bound to be delay in release which has commenced right from FCI import started which has bad effect on number of trips to FSD. Due to this, the truck owners are reluctant to supply trucks and demand double rate or fixed rate for 24 hours which is usually double or more the rate exists. In the last para of this letter recommendation is that the request of the contractor may be forwarded to the concerned for proportionate excalation of the rate as demanded by the contractor. There is thus clear and categorical admission in this letter that the demand of the contractor was not unjustified and even for transportation charges the contractor was entitled to more than the double rate or more than the rate which exists. The contractor has given full justification claiming transportation charges at Rs.45/- as against the agreed rate of Rs.15/- per MT.

35. It is not that this letter came as surprise to the defendant. It was well within the knowledge of the defendant. It was in response to the representation made by the plaintiff, still, no action was taken to accept or

reject this recommendation of the officials of the F.C.I.

36. It is note worthy to mention that in Para : 7 of the plaint there is clear mention of this letter, namely, letter written by the Assistant Manager, Docks to Joint Manager (PO) recommending the plaintiff's case and justifying the claim of the plaintiff for enhanced rate of money towards increased rate of discharge put in by the plaintiff. The reply to Para : 7 of the plaint as contained in the written statement is vague and evasive. In Para : 17 of the written statement it is mentioned that with regard to Para : 7 of the plaint the injunction application is not true and not correct. Plaintiff has unnecessarily repeated the alleged claim for payment towards increased rate of discharge. The true position stands explained as referred above. This is actually no specific denial of the contents of Para : 7 of the plaint. Vague denial amounts to admission of allegations made in Para : 7 of the plaint. Thus, there is not only admission of this letter in the pleadings namely, the written statement, but also in evidence, namely, when the letter aforesaid was filed by the defendant and its contents were not denied. Consequently on the basis of this evidence coupled with oral statement of the plaintiff's witness Jayantilal Mohanlal Patel, we are of the opinion that the plaintiff has succeeded in establishing the claim for extra remuneration for unloading as well as for transportation.

37. Then comes the next question as to what is the amount now payable to the plaintiff on these counts.

38. From the evidence on record a chart was prepared for our ready reference by the learned Counsel for the appellant and according to that chart four vessels were cleared and unloaded by the plaintiff. The total net quantity of vessel as per bill of lading was 53600 MT. The total net quantity in the bill for discharge was 53449 MT. for which the F.C.I. paid Rs.57,72,492/-. Likewise quantity transported by trucks from the port to F.S.D. Gandhidham was 36131 MT. for which the F.C.I. paid to the plaintiff a sum of Rs.5,41,965/- at the rate of Rs.15/per MT. For unloading the rate of payment was Rs.108/- per MT. Thus, for total discharge and handling of the goods weighing 53449 MT. the plaintiff actually claimed amount to the tune of Rs.57,19,043/- at the difference rates of Rs.107/- per MT. The suit claim is however confined on this head to Rs.57,22,263.70 ps. It is not understood how against the actual claim of Rs.57,19,043/- claim was made in the Suit for extra unloading charges to the tune of Rs.57,22,263.70 ps. The

claim on this head cannot be accepted beyond Rs.57,19,043/-.

39. Likewise for transportation charges for 36131 MT. the difference claim of the plaintiff at the rate of Rs.30/- per MT. comes to Rs.10,83,930/- against which in the suit claim has been set up for Rs.10,84,849.50 ps. which is again beyond actual claim which cannot be permitted.

40. Thus, the plaintiff is entitled on the two counts to a net amount of Rs.68,02,973/- and not to a sum of Rs.68,07,113.20 ps. The trial Court, in our view, was therefore in obvious error in dismissing the Suit of the plaintiff.

41. The Appeal has, therefore, to be allowed. However, before allowing this Appeal we are conscious of the fact from catena of decisions rendered by the Apex Court that if the Appellate Court desires to reverse the judgment and decree of the trial Court it should discuss each and every findings and set aside the findings which are contrary to law. While undertaking that exercise in the instant Appeal we find that the findings recorded by the trial Court on issue No.1 regarding jurisdiction were not challenged before us nor any cross objection or cross Appeal has been filed. Consequently findings on issue No.1 require no interference. Likewise findings on Issue Nos.2 & 3 were also not challenged before us hence these two findings have also to be confirmed. Findings on Issue No.5 also require no interference. We have also found from the evidence on record that the plaintiff unloaded extra quantity of goods which was more than that stipulated in the tender and also despatched extra quantity of goods to the F.S.D. Gandhidham of the defendant F.C.I. We, however, do not agree with the findings of the trial Court recorded on Issues No.4 & 6 which are hereby set aside. We also set aside the findings of the trial court that under the terms of the Agreement the plaintiff is not entitled to any extra amount.

41. For the reasons stated above the claim of the plaintiff succeeds to the extent of recovery of Rs.68,02,973/- only.

42. In the forgoing portion of the Judgment we have already held and observed that the plaintiff is not entitled to Reliefs (a), (b) & (c) contained in Para : 14 of the plaint. Relief (d) is residuary relief. Relief (e) can be partly granted. The Plaintiff instead

of Rs.68,07,113.20 ps. is entitled to recover from the defendant a sum of rs.68,02,973/- only. Thus, this relief is partly granted in favour of the plaintiff.

43. In this very relief interest has been claimed at the rate of 18 % p.a. from the due date till its realisation. Shri B.P.Tanna for the appellant admitted that there was no agreement between the parties for payment of interest by the F.C.I. The written agreement does not contain such stipulation for payment of interest. Due date has not been clarified in the plaint. It is not mentioned in the plaint from which date interest has been claimed at the rate of 18 % p.a. Since no final decision was taken by the F.C.I. it cannot be said that the claim was refused by the F.C.I. before institution of the Suit. As such we are not inclined to grant any interest to the plaintiff before institution of the Suit. Of course since the plaintiff's money remained blocked we are inclined to grant interest pendentlite and future to the plaintiff. It is further to be seen whether the claim of pendentlite and future interest at the rate of 18 % p.a. is permissible u/s. 34 of the C.P.C. Looking to the nature of contract we are unable to accept that it was a commercial transaction. Consequently proviso to Section 34(1) C.P.C. is not attracted. On the other hand Sec. 34(1) C.P.C. is attracted under which in case of money decree the Court may in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the Suit to the date of the Decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the Suit (with further interest at such rate not exceeding 6 % p.a. as the Court deems reasonable on such principal) from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit. Keeping in view this provision and the Apex court's verdict in Pilloo Dhunji Shaw Sidhwa v/s. Municipal Corporation of the City of Poona, reported in AIR 1970 SC 1201, we are inclined to award interest at the rate of 6 % p.a. pendentlite and future.

44. Since the plaintiff succeeds in part only the plaintiff is entitled to proportionate cost through-out.

45. The Appeal is, therefore, allowed. The Judgment and Decree of the trial court are set aside. Reliefs a, b & c contained in Para : 14 of the plaint are refused. The plaintiff's Suit is partly decreed for recovery of Rs.68,02,973/from the defendants together with pendentlite and future interest at the rate of 6 % p.a.

with proportionate cost through-out. Rest of the suit is dismissed.

sd/-
(D. C. Srivastava, J.)

Date : August 07, 2000 sd/-
(H. K. Rathod, J.)

sas